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AUTHOR Soffin, Stan
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ABSTRACT

To determine if state departments of public instruction have attempted to follow decisions by federal circuit courts of appeals in establishing guidelines or policies governing prior review regulations of student literature and student publications, a study compared state guidelines on freedom of expression in place in 1974 with those in effect in 1984. Furthermore, to determine if state departments of public instruction had altered their freedom of expression policies to conform with governing appellate court rulings, the 1984 policies were compared with 1974 policies. No uniformity of opinion was found on the issue of prior review of student publications in public schools. Like the disagreement in the federal courts of appeals, state level school boards disagreed over advising local school districts to adopt prior review policies. Little correlation was found between freedom of expression guidelines developed by state departments of public instruction and their respective federal courts of appeals. And, little change was found between 1974 and 1984 concerning the adoption of procedural guidelines to accompany prior review policies. (HOD)

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Prior Review Guidelines for Student Publications:

State Departments of Public Instruction

v.

The Federal Circuit Courts

by

Stan Soffin
School of Journalism
Michigan State University
East Lansing, Michigan

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"PERMISSION TO REPRODUCE THIS MATERIAL IN MICROFICHE ONLY HAS BEEN GRANTED BY
Stanley I. Soffin

ABSTRACT

Prior Review Guidelines for Student Publications:
State Departments of Public Instruction v. The Federal Circuit Courts

This study seeks to determine if state departments of public instruction have attempted to follow decisions by federal circuit courts of appeals in establishing guidelines or policies governing prior review regulations of student literature, and in particular, student publications. Of the five federal appellate courts that have ruled specifically on prior review in public schools, only one (the Seventh Circuit) has totally rejected any form of prior review. The others (the First, Second, Fourth and Fifth Circuits) have approved of pre-publication review of student literature, but only if coupled with procedural guidelines to govern their application.

To determine if a correlation exists between public policy and court action, the author compared freedom of expression guidelines or policies issued by state departments of public instruction in 1984 with the controlling court rulings, if any, at the federal appellate court level. Furthermore, to determine if state departments of public instruction had altered their freedom of expression policies to conform with governing appellate court rulings, the 1984 policies were compared with 1974 policies.

The study revealed little correlation between state policy and court rulings and few attempts to alter policies to meet federal appellate court decisions. In addition, the policies failed to point out the problems inherent in writing and administering prior review policies.

Prior Review Guidelines for Student Publications:
The States v. Courts

Between 1974 and 1984, the federal courts ruled on more than 60 cases involving freedom of expression of high school students. In conflict was the school administrators' perceived right to exercise control over the content of student publications and the students' First Amendment right to freedom of expression.

At the center of the conflict was the issue of prior restraint--the practice of pre-publication review of student publications by school officials. Although several of the lower federal courts of appeal have issued inconsistent rulings on this issue, the United State Supreme Court has not squarely addressed prior review as applied to the content of student publications in in public schools. The Supreme Court did, however, set the parameters for the debate in its landmark decision, Tinker v. Des Moines Independent School District.[1] The high court ruled in 1969 that school officials cannot abridge students' right to freedom of expression in public schools. If, however, school administrators could reasonably predict that student expression on school grounds would "materially and substantially interfere with the requirements of appropriate discipline in the operation of the school," they could stop or prevent the expression.[2]

Recognizing the special nature of the schools, the Court ruled that neither "students [nor] teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate. This has been the unmistakable holding of this

Court for almost 50 years."[3] The Court added, however, that school officials could justify "reasonable regulation of speech-connected activities in carefully restricted circumstances." [4] In Tinker, had the Des Moines school officials been able to justify their assertion that the wearing of black armbands in Des Moines public schools to protest U.S. policy in Vietnam would have caused "substantial disruption of or material interference with school activities," the Court apparently would have upheld the curtailment of expression.[5]

Following the Tinker decision, the lower courts applied the disruption standard to cases involving student literature, including student publications. In all but one case, federal courts ruled in favor of students who had asserted that school officials had improperly invoked Tinker in stopping or curtailing their distribution of literature.[6]

At the same time, the federal appeals courts have disagreed on whether the Tinker decision permits school administrators to exercise prior review of student publications. Only administrators in the three states located in the U.S. Court of Appeals for the Seventh Circuit--Illinois, Indiana and Wisconsin--could look to their federal appeals court and find case law specifically prohibiting them from exercising prior restraint on student literature in public schools.[7] School officials in the eighteen states comprising the First, Second, Fourth and Fifth U.S. Courts of Appeal could find court rulings that approved the concept of prior review for specifically proscribed speech--but only if such policies were accompanied by narrowly written procedures to mitigate the potentially adverse effects of prior

restraint.[8] The appeals courts for the remaining six federal circuits have not ruled on this specific issue.

The four federal appeals courts that have approved the concept of prior review have collectively provided guidelines, or procedural safeguards, that school officials should follow if their prior review regulations are to be constitutionally valid. These are:

(1) precise criteria spelling out proscribed content for reasonably intelligent students;

(2) a statement informing students to whom and how they are to submit literature for approval before distribution;

(3) a definition of distribution;

(4) a statement explaining the standards on which the school administrator is to decide;

(5) a reasonably brief period of time in which the school official exercising prior approval should announce a decision;

(6) instructions on what course a student should follow if a school official fails to act within the prescribed period; and

(7) a prompt appeals procedure to challenge a school administrator's decision.[9]

The courts reasoned that these written procedural guidelines would help prevent legally protected content from being caught in the broad sweep of prior review regulations. This position represents a compromise plan by the courts to deal with school officials who argued that they could not maintain order in the

schools without prior review, and students who argued that prior review inside the schoolhouse gate would violate their right to freedom of expression.

The Seventh Circuit specifically objected to the compromise position that would accept prior review policies only if accompanied by written procedural guidelines. The appeals court panel reasoned that it was better to impose post-publication punishment on students who violated rules of proscribed content than run the risks inherent in prior review policies.[10]

To complicate the issue, however, no court has ever approved a set of written procedural guidelines governing school officials who required students to submit literature to them for approval prior to distribution and who subsequently banned the literature from distribution. This has created a Catch 22 situation for both students and school administrators. While courts have upheld the concept of prior review in public schools, none has approved a specific policy necessary to enforce prior review.[11]

The purpose of this study, then, is to determine how state-level school administrators have responded to court action regarding prior review of student publications inside the schoolhouse gate. Given the conflicting decisions by five federal circuit courts of appeal and the absence of any ruling on this issue in the remaining six circuits, the author expected to find contradictions in state-level guidelines on freedom of expression. The study was also expected to reveal that state departments of education located in federal circuit courts of appeal that have ruled on the issue of prior review would

adopt positions on prior review consistent with the rulings of their circuits.

Furthermore, to determine if state-level school administrators made a conscious effort to meet the standards of their federal circuits, the author compared state guidelines on freedom of expression in place in 1974 with those in effect in 1984. It was expected that states whose freedom of expression guidelines failed to conform to prior review standards by the governing federal appeals court in 1974 would have modified their positions to meet the standards by 1984.

The guidelines on freedom of expression were first requested in 1974 for a previous study and collected again in 1984 for the the present study. Each time, the author wrote to the state superintendents of public instruction to request the guidelines. If a state had no guidelines on freedom of expression, the superintendent was asked to so indicate on the return response sheet that accompanied the request. The two sets of freedom of expression guidelines were then analyzed and compared (see Chart, p. 15).

In 1974, 37 superintendents responded, for a 74 percent return rate. In 1984, 48, or 96 percent, of the state superintendents replied. Of the 33 states responding to both requests, 16 had revised their policies sometime during the 10-year period. The study shows that 60.5 percent of the states offered no guidelines in 1974, a figure that increased to 62.5 percent in 1984. The school chiefs in many of these states said they defer all such school policies to local school districts.

Despite the court cases centering specifically on prior

review regulations in public schools during this period, the state guidelines reveal little change or compliance with standards set down in appeals court decisions on prior review of student literature in either 1974 or 1984. The policy in North Dakota reflects the anticipated confusion: ". . .state and federal court decision indicate that schools can only censor an article under certain conditions. What will be decided in North Dakota is anyone's guess."[12]

Prior Review Rejected

Of the 37 states that provided guidelines for local school districts in 1974, only three--California, Delaware and Illinois--specifically rejected any form of prior review. For example, the detailed student rights and responsibilities guidelines for the state of Delaware included this statement: ". . . The development of standards and guidelines should preclude the necessity of prior censorship of publications." [13]

Two other states--Massachusetts and New York--also appear to have rejected prior review in 1974, but the language of their documents leaves room for interpretation. For example, the general law of the Commonwealth of Massachusetts states:

> ". . . Freedom of expression shall include without limitation, (sic) the rights and responsibilities of students collectively and individually. . . (b) to write, publish and disseminate their views. . . ." [14]

Such language suggests a prohibition against any form of prior review, which limits student rights to freedom of expression.

By 1984, Arkansas, Delaware, Massachusetts and West Virginia were alone in advising local school officials to avoid prior

review regulations. New York also appears to have rejected prior review in 1984, but again, the language is not specific.

None of these states, except Illinois (Seventh Circuit), is located in a federal appeals court jurisdiction that has ruled against any form of prior review in public secondary schools. And of the five states totally rejecting prior review by 1984, Massachusetts (First Circuit), New York (Second Circuit) and West Virginia (Fourth Circuit) are located in federal circuit court jurisdictions that have approved the compromise position. Although Arkansas is in the Eighth Circuit, which has not ruled on prior review policies, its 1976 student discipline policy clearly advises against prior review:

> . . . The principal or any member of the school staff shall not require that literature, including school-sponsored publications[,] be submitted for approval or consent prior to distribution. . . .[15]

Prior Review Approved

Of the policies submitted in 1974, none specifically sanctioned any form of prior review policies. By 1984, three states--California, New Hampshire and Oregon--had approved prior review regulations, each, however, without setting down specific written rules to govern their use. And of these states, California was adhering to a state statute enacted in 1977; New Hampshire is located in the First Circuit; and Oregon, in the Ninth Circuit, which has not ruled on prior restraint involving public school students.[16]

Prior review regulations coupled with procedural guidelines gathered modest support at the state level between 1974 and 1984, despite the decisions in four circuit courts of appeal. Only Pennsylvania favored the compromise position in 1974:

> . . . the school board of directors has the right to have printed material submitted to the appropriate school official prior to distribution within the school for the purpose of determining whether distribution would result in substantial disruption of or material interference with school activities. The rules for prior submission must be specific.[17]

The details of the prior review policy, however, were not spelled out sufficiently to meet the criteria above.

By 1984, Alabama, Idaho, New Hampshire and Ohio had joined Pennsylvania in advising local school districts to couple procedural safeguards with prior review regulations in dealing with student literature. All of these state policies, however, failed to point out the specific procedural criteria that the guidelines should include. Pennsylvania, which had revised its 1974 policy, included three of the seven criteria, while New Hampshire advised school officials to exercise fairness, haste and effectiveness in implementing prior screening procedures.[18]

In this instance, some correlation exists between the federal circuit courts of appeal in which these states are located and the states' prior review guidelines. Both New Hampshire

(First Circuit) and Alabama (Fifth Circuit) have federal circuit courts of appeal that have approved prior review policies only if coupled with procedural guidelines. The federal appeals courts for Pennsylvania (Third Circuit), Idaho (Ninth Circuit) and Ohio (Sixth Circuit) have not ruled on the issue in student cases.

The positions on prior review by the other state departments of public instruction remain as unclear in 1984 as they were in 1974; hence, local school officials in those states receive no guidance at the state level on whether they can legally implement prior review policies. As the policy in North Dakota said, "it's anybody's guess."

Catch 22 Created

The issue is complicated by court rulings favoring the compromise position. While the First, Second, Fourth and Fifth Federal Circuit Courts of Appeal have sanctioned prior review regulations accompanied by written guidelines, no federal court has in fact approved such guidelines. The courts have found attempts to write such procedures defective--usually because they were vague and overbroad--and therefore an unconstitutional infringement of students' First Amendment rights. The regulations also failed to clearly identify and define proscribed content and to explain how school officials were to implement the screening procedures to the judges' satisfaction.[19]
None of the school policies submitted in 1974 or 1984 points out the critical criteria necessary to impose a system of prior review on student publications. Local school officials looking for guidance in state-level policies, therefore, will find little direction for implementing prior review policies, and, just as

importantly, will find little or no warning that such policies have never been approved by a federal court.

For example, the "Freedom of the Press" section of the student rights and responsibilities document for the state of Ohio errs on two points. First, the document claims that "Courts have generally agreed that 'expression by high school students may be subject to prior screening. . . .'" The word generally here is a bit generous in interpreting court actions. Second, the document says that prior screening must take place ". . . under clear and reasonable regulations . . . ." [20] That is true, but the document fails to provide school officials with the necessary criteria for establishing "clear and reasonable regulations" or with the warning that the courts have rejected all attempts to write such regulations.

Such policies exemplify the Catch 22 problem cited above. School officials have been told by four of the eleven circuit courts of appeal that prior review policies coupled with written procedural guidelines are constitutionally valid. As a result, prior review policies appear in state-level guidelines, but these policies fail to include any reference to the federal appellate courts' rejection of every prior review policy challenged by students. Such warning would seem to be a necessary part of any prior review guideline, if only to inform local school officials of the problems inherent in such policies.

Time, Place and Manner Regulations

Significantly, most states with freedom of expression policies include guidelines on when distribution of student

literature may occur. Typically, these guidelines refer to time, place and manner restrictions--not content or due process issues.

For example, Massachusetts, which clearly prohibits any form of prior review, limits distribution at "those times and places which substantially disrupt the educational process."[21]

Prohibitions against content that is obscene, libelous or likely to disrupt school decorum emerge from all the policies in both 1974 and 1984 as the most frequently cited type of proscribed content. Advising students against distributing literature that includes such unprotected expression, however, does little to explain to students and administrators how--or even if, in some policies--such content is to be screened and possibly banned from distribution. For the few states whose guidelines impose no prior review procedure, identifying proscribed content serves as a warning to students that they are responsible for such content and that they risk post-publication punishment for abuses. This is precisely the position endorsed by the Seventh Circuit Court of Appeals.[22]

Libel and obscenity pose still more problems. While they are terms familiar to both student journalists and school officials, they may not be clearly understood. Because of this, the Fourth Circuit Court of Appeals warned:

> . . . while school authorities may ban obscenity and unprivileged libelous material there is an intolerable danger, in the context of prior restraint, that under the guise of such labels, they may unconstitutionally choke

off criticism, either of themselves, or of school policies, which they find disrespectful, tasteless, or offensive. That they may not do.[23]

A similar warning, however, did not appear in any of the policies submitted in either 1974 or 1984.

Discussion

As expected, this study found no uniformity of opinion on the issue of prior review of student publications in public schools. Like the disagreement in the federal courts of appeals, state-level school boards disagree over advising local school districts to adopt prior review policies. The Supreme Court, by not ruling on this issue, continues to make it possible for the federal circuits to disagree with each other.[24]

The study found little correlation between freedom of expression guidelines developed by state departments of public instruction and their respective federal courts of appeal. Some states, such as Massachusetts, have guidelines that contradict decisions of their federal appeals courts. Others, such as Arkansas, have adopted positions against prior review absent any ruling on the issue by their federal appeals court. Still others, such as North Dakota, have not opted to recommend a position either for or against prior review.

Between 1974 and 1984, not much changed concerning the adoption of procedural guidelines to accompany prior review policies. Perhaps this is because no set of procedural guidelines has found court approval. This leaves those states

recommending such guidelines to local school districts out on a narrow limb. If the winds of student protest stir again, such policies may topple.

Hence, while a few state departments of public education have attempted to abide by appeals court decisions in developing freedom of expression guidelines, most policies are inadequate. The policies fail to warn school officials of the Catch 22 implicit in prior review regulations; of the difficulties in defining legal terms such as libel and obscenity; and of the failure of school officials to justify their pre-publication censorship of literature based on a prediction of substantial and material disruption to school decorum--the Tinker disruption factor.

During the ten-year interval of this study, most state school officials have either ignored or failed to understand federal court decisions that directly influence freedom of expression policies affecting high school students from coast to coast.

A solution to this problem could be found in policies that clearly spell out the legal traps for both school officials and students. Obviously, school officials intent upon imposing prior review on student publications risk violating the First Amendment, for the courts have not endorsed such policies. Also, school officials must be informed of the appellate courts' opposition to school officials who attempted to establish screening procedures to identify proscribed content. On the other hand, school systems that impose no prior review on student publications should advise students of unprotected speech for

which they may be held accountable after publication and distribution.

Furthermore, both sides should realize that the rules or guidelines governing student freedom of expression are potentially limiting of First Amendment rights on their face, and that guidelines bear a "heavy presumption against [their] constitutional validity.[25]

Further study should seek to establish to what extent guidelines developed by state departments of public instruction are adopted by local school districts. Given the confusion at the state level on this issue, one can only guess at the level of confusion at the local level.[26] Still another study should determine the correlation, if any, between federal district court rulings on prior review in the seven federal circuits that have not ruled on this issue and freedom of expression policies developed at the local level in those federal court districts. In addition, a study of state statutes governing the student press, such as in California and Massachusetts, should undergo a similar study.[27]

CHART

Key: x = proscribed content
* = prior review sanctioned
\+ = prior review sanctioned; procedural guidelines suggested
? = prior review appears to be prohibited
\- = prior reveiw prohibited
\# = no reply

state	obscenity 74	obscenity 84	libel 74	libel 84	disruption 74	disruption 84	prior review 74	prior review 84	no guides 74	no guides 84	no reply 74	no reply 84
Ala.						X		+			#	
Alaska									x	X		
Arizona										X	#	
Ark.						X		-	x			
Calif.	x	X	x	X	x		-	*				
Colo.									x	X		
Conn.						X					#	
Delaware	x	X	x	X	x	X	-	-				
Florida					x					X		
Georgia									x	X		
Hawaii	x		x		x					X		
Idaho	x		x					+				
Illinois	x		x		x					X		
Indiana									x	X		
Iowa									x	X		
Kansas									x	X		
Kentucky									x	X		
Lousiana									x	X		
Maine	x		x									#
Maryland		X		X		X			x			
Mass.					x	X	?	-				
Michigan	x	X	x	X	x	X						
Minnesota									x	X		
Miss.									x	X		
Missouri									x	X		
Montana									x	X		
Nebraska										X	#	
Nevada									x	X		
New Hamp.		X		X		X		+	x			
New Jersey						X					#	
New Mexico	x		x									#
New York	x	X	x	X	x	X	?	?				
N. C.									x	x		
N. D.		X		X		X					#	
Ohio						X					#	

CHART cont.

state	obscenity 74	obscenity 84	libel 74	libel 84	disruption 74	disruption 84	prior review 74	prior review 84	no guides 74	no guides 84	no reply 74	no reply 84
Okla.									x	X		
Oregon		X		X		X		*			#	
Penna.	x	X	x	X	x	X	+	+				
R. I.										X	#	
S. C.										X	#	
S. D.		X		X		X			x			
Tenn.										X		
Texas										X	#	
Utah									x	X		
Vermont										X	#	
Virginia									x	X		
Wash.									(1)	X		
W. Va.	x	X	x	X	x	X		-				
Wisc.										X	#	
Wyoming									x	X		

(1) Washington policy indicates that students have First Amendment rights; no details specified.

ENDNOTES

1. 393 U.S. 503 (1969).

2. Ibid., at 514.

3. Ibid., at 506.

4. Ibid., at 513.

5. Ibid., at 514.

6. Fresca v. Andrews, 464 F. Supp. 1043 (E.D. N.Y. 1979). The U. S. Court of Appeals for the Second Circuit added content that might cause "significant psychological harm to ninth and tenth grade students" to the Tinker disruption standard of proscribed content. (Trachtman v. Anker, 563 F. 2d, 1977, cert. denied., 435 U.S. 925.); likewise, in Williams v. Spencer, 622 F. 2d 1200 (4th Cir., 1980) the appeals court upheld a ban against advertisement that might encourge action that would endanger the health and safety of students.

7. See Fujishima v. Board of Education, 460 F. 2d 1355 (7th Cir., 1972) and Jacobs v. Board of School Commissioners, 490 F. 2d (7th Cir., 1973), dismissed as moot, 420 U.S. 128 (1975).

8 See inter alia, Riseman v. School Committee of City of Quincy, 439 F. 2d 148 (1st Cir., 1971); Eisner v. Stamford Board of Education, 440 F. 2d 803 (2d Cir., 1971); Baughman v. Freienmuth, 478 F. 2d 1345 (4th Cir., 1973); Shanley v. Northeast Independent School District, 462 F. 2d 960 (5th Cir., 1973).

9. Ibid. See also Quarterman v. Byrd, 453 F. 54 (4th Cir., 1973).

10. Fujishima, supra.

11. See Baughman, supra, and Nitzberg v. Parks 525 F. 2d. 378 (4th Cir., 1975).

12. Student Rights and Responsibilities: Some Questions and Answers, North Dakota Department of Public Instruction, 1980, p. 15.

13. Resource Material for Developing Local School District Policies Regarding Student Right and Responsibilities, Delaware State Department of Public Instruction, 1971, p. 4.

14. An Act Defining and Clarifying Certain Rights and Responsibilities of Public Secondary School Students, General Assembly, Commonwealth of Massachusetts, 1974. p 1.

15. Model School Board Policies for Student Discipline, Arkansas Commission on Pupil Discipline in Public Schools, May 1, 1976, p. 11.

16. See Nicholson v. Board of Education, Torrance Unified School District, 682 F. 2d 858 (9th Cir., 1982). This case involves a high school journalism teacher who claimed he was fired because he refused to exercise prior review to check for accuracy of student material submitted for a school publication. The court ruled in favor of school officials in the first federal court decision involving a school newspaper adviser and school administrators. The case, then appears to place the Ninth Circuit in concert with the First, Second, Fourth and Fifth Circuits in authorizing prior review, as well as a 1977 California state law; however, Judge Spencer Williams, who wrote the Nicholson decision, said the case did not involve censorship of a student publication by school administrators. He wrote, however, that "outright prohibition of censorship would require a strong showing on the part of the school administrators that publication of forbidden materials would 'materially and substantially interfere with the requirements of appropriate discipline in the operation of the schoool.'" While the judge makes no specific reference to procedural guidelines, he did cite Quarterman v. Byrd, supra. See also Jergeson v. Board of Trustees, 476 P 2d 481 (Wy. 1970) and Wesolec v. South Bend Community School District, Civil Act No. 73 S 101 (N.D. Ind., Oct. 2, 1973) (unpublished).

17. Regulations and Guidelines on Student Rights and Responsibilities, Commonwealth of Pennsylvania, Department of Education, Sept. 13, 1974, p.9.

18. Ibid., 1984, p. 16; A Handbook of Suggested Guidelines and Model Codes for the Developemnt of Discipline Programs in New New Hampshire Schools, New Hampshire Department of Education, 1979, p. A-14.

19. Baughman, supra.

20. Rights and Responsibilities: Administrative Guidelines, Ohio Department of Education, 1983, p. 2.

21. Commonwealth of Massachusetts, supra.

22. Fujishima and Jacobs, supra.

23. Baughman, supra., 1351.

24. The Supreme Court sidestepped this exact issue in Jacobs v. Board of School Commissioners, 490 F. 2d. 601 (7th Cir., 1973), vacated and dismissed as moot, 420 U.S. (1975).

25. Baughman, supra., 1350.

26. See Robert Trager and Donna Dickerson, "A Ban on Prior Restraint in High Schools: The Aftermath of the Fujishima Decision," A paper presented to the Secondary School Division, Association for Education in Journalism, Madison, Wisc., August 1977.

27. See Wayne Overbeck, "Protecting Student Press Freedom by State Law: The Experience in California," A paper presented to the Secondary School Division, Association for Education in Journalism, Madison, Wisc., August 1977. See also Thomas Eveslage, "Are model guidelines possible through state?", C:JET, Fall 1982, p.16.